United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

B P/B

75-7135

To be argued by
WILLIAM SCHURTMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET NO. 75-7135

WILLY DREYFUS,
Plaintiff-Appellant,

v.

AUGUST VON FINCK and MERCK, FINCK & CO.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES AUGUST von FINCK AND MERCK, FINCK & CO.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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WILLY DREYFUS, :

Plaintiff-Appellant, :

-against- : Docket No. 75-7135

AUGUST von FINCK and MERCK, FINCK & CO., :

Defendants-Appellees. :

- -X

BRIEF ON BEHALF OF DEFENDANTS-APPELLEES
AUGUST von FINCK and MERCK, FINCK & CO.

PRELIMINARY STATEMENT

Plaintiff-appellant ("plaintiff") appeals from an order dated January 21, 1975* of Judge Charles L. Brieant, Jr. of the United States District Court for the Southern District of New York dismissing plaintiff's amended complaint (App. R) for failure to state a claim upon which relief can be granted.

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* A copy of the January 21, 1975 order is set forth in the Joint Appendix as document "U". Hereafter, references to documents contained in the Joint Appendix will be to "App." followed by the letter by which the document is designated therein, as, e.g., "App. U".

STATEMENT OF THE ISSUES

1. Did the district court err in holding that plaintiff's amended complaint failed to state a claim for relief under the treaties alleged therein?

2. Did the district court err in holding that plaintiff's amended complaint failed to state a claim for relief under the law of nations?

3. Does the Act of State doctrine permit the exercise of jurisdiction over plaintiff's claims?

4. Do the federal courts have subject matter jurisdiction over plaintiff's claims under the law of nations and the treaties of the United States?

5. Do the federal courts have subject matter jurisdiction over plaintiff's claims under Military Government Law No. 59?

6. Has the plaintiff stated a claim for relief under Military Government Law No. 59?

7. Should plaintiff's common law claims be adjudicated under the doctrine of pendent jurisdiction?

STATEMENT OF THE CASE

This is an action commenced in the United States District Court for the Southern District of New York by a citizen and resident of Switzerland against two citizens and residents of West Germany based on events which took place entirely in Germany more than 25 years ago.

Plaintiff purported to obtain jurisdiction over the foreign defendants by attaching their bank accounts in New York and by mailing copies of the summons and complaint to the defendants in West Germany.

The amended complaint

The amended complaint (App. R) alleges that plaintiff Willy Dreyfus is a citizen and resident of Switzerland (¶ 1) and that defendants are residents and citizens of West Germany (¶¶ 3 and 4).

The amended complaint also alleges that in 1938 the Nazis compelled plaintiff, who was Jewish, to transfer the German banking firm of J. Dreyfus & Co., and all of his interests therein, to the defendants at a completely unfair, illegal, inadequate and inequitable price; that plaintiff and his family were forced to leave Germany; that plaintiff sought appropriate compensation from the defendants after the end of World War II and entered into a settlement agreement in 1948, which defendants thereafter allegedly refused to honor and, in fact, renounced.

The amended complaint seeks damages and an accounting, but does not offer any explanation why plaintiff waited 25 years to bring the present action.

The commencement of this action

On December 12, 1973 plaintiff filed his original complaint and on January 15, 1974 plaintiff obtained an ex parte order of attachment from the district court in the amount of $150,000 which was used to tie up bank accounts maintained by defendants in New York (App. E). Plaintiff posted a $15,000 bond (App. F).

In order to free their bank accounts, and without in any way conceding the validity of the attachment or consenting to jurisdiction, the defendants had to post a bond of $150,000 (not $15,000 as plaintiff incorrectly alleges at page 5 of his appeal brief) (App. G) and the attachment was vacated by a consent order dated February 5, 1974.

Defendants' motion to dismiss the original complaint

Defendants moved (App. H), pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss the complaint on the following grounds: (a) lack of subject matter jurisdiction, (b) lack of personal jurisdiction, (c) forum non conveniens, and (d) insufficient service of process, but subsequently waived their challenge to sufficiency of service and deferred, without prejudice, their claim of lack of personal jurisdiction and forum non conveniens.

In their motion papers, defendants pointed out, inter alia, that the complaint neglected to inform the court that the parties had litigated the validity of the 1948 settlement in the German courts and had ultimately entered into a new settlement agreement dated February 12, 1951 which ended the litigation and settled all of plaintiff's claims against defendants upon payment by defendants to plaintiff of a substantial sum. Defendants submitted as Exhibit "B" a copy of an opinion dated March 7, 1951 by the Court of Restitution Appeals of the United States Courts of the Allied High Commission for Germany ("CORA") which states, at page 2:

> "The motion was set for hearing before us on the 12th day of February, 1951. Whereupon, in open court, the parties announced to the Court that they had arrived at an amicable settlement and they requested that a signed agreement be recorded. This was accepted and recorded."

and at page 4:

> "It is further ordered that the joint motion of the parties to withdraw the Motion for Recall and for other appropriate relief be, and the same is hereby granted. The claimants petition is dismissed."

(Reply Affidavit of William Schurtman, sworn to April 26, 1974; App. K)

The reference to this superseding 1951 court-approved settlement, which was artfully omitted from the original and also from the later amended complaint*, is relevant on this appeal because of plaintiff's

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* Plaintiff is in error when he claims at page 4 of his brief on appeal that he alleged the 1951 settlement in his amended complaint. He did not.

decision to broaden the issues before this Court by relying on Military Government Law No. 59 - the very law under which CORA approved the 1951 settlement some twenty-four years ago. (See plaintiff's appeal brief, p. 33).

Plaintiff's brief on this appeal alleges for the first time - but still without the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure - that the 1951 settlement was fraudulent. Moreover, plaintiff's brief on appeal again fails to explain why plaintiff waited more than twenty years before making this claim.*

In a memorandum opinion dated May 20, 1974 (App. L), Judge Brieant concluded that the district court had subject matter jurisdiction, but dismissed the complaint for failure to state a claim upon which relief could be granted. He expressly held that the treaties on which plaintiff relied - the Hague Convention, the Kellogg-Briand Pact, the Treaty of Versailles and the Four Power Occupation Agreement - did not give rise to private causes of action, and also that the Act of State doctrine barred the district court from considering the legitimacy of the acts of the German government.

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* Since the district court twice dismissed the complaint for failure to state a claim, defendants have not been required to file an answer. If an answer were necessary, it would include not only a denial of the allegations of wrongdoing, but also defenses of payment, release, settlement, accord and satisfaction, statute of limitations and laches. In addition, defendants would renew their motion to dismiss the action on the ground of forum non conveniens since the action involves a Swiss plaintiff, German defendants, events which took place entirely in Germany, evidence and witnesses located in Germany, proof in the German language, and no explanation by plaintiff why this action cannot or should not be brought in a West German court.

The amended complaint

Plaintiff moved for rehearing and reargument (App. N). By order dated June 26, 1974 (App. Q), the district court granted the motion and modified the May 20, 1974 memorandum opinion to permit plaintiff to file an amended complaint that:

> "...shall allege with particularity specific provisions of such treaty or treaties relied upon."

Plaintiff then served defendants with an amended complaint (App. R) which was substantially similar to the original complaint (App. B), but which purported to conform to the judge's requirement that the treaty provisions be specified with particularity.

The dismissal of the amended complaint

Defendants then moved (App. S) to dismiss the amended complaint principally on the grounds of failure to state a claim and lack of subject matter jurisdiction.*

By a memorandum opinion dated January 2, 1975, the district court dismissed the amended complaint for failure to state a claim on which relief could be granted. The district court also suggested, though it noted that it need not so hold, that the Act of State doctrine barred consideration of plaintiff's claims (App. T).

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* The motion also asserted the grounds of lack of personal jurisdiction and forum non conveniens, but these issues were deferred without prejudice.

Plaintiff's expansion of the issues on this appeal

On February 18, 1975, plaintiff filed a Notice of Appeal and, on May 15, 1975, moved (App. V) to remand this action to the district court on the ground that plaintiff had failed to raise in the district court a question of law allegedly necessary for the resolution of the case, namely, the applicability of Military Government Law No. 59. Defendants objected on the ground that Military Government Law No. 59 had been expressly called to the attention of the district court by defendants in their Memorandum in Opposition to Plaintiff's Motion for Rehearing and Reargument, which stated, at page 10:

> "The Four Power Occupation Agreement is neither self-executing nor sufficiently precise nor detailed to permit judicial enforcement. It was implemented by Military Government Law No. 59 (the "Restitution Law"), which expressly authorized victims of Nazi laws to institute restitution actions in Germany. Actions were initiated in local German courts called Restitution Chambers; the Court of Restitution Appeals ("CORA"), an American court in Germany, had exclusive jurisdiction of appeals. (cf. the 1951 CORA decision in the Dreyfus action, annexed as Exhibit B to defendants' reply affidavit by William Schurtman, sworn to April 26, 1974).
>
> Since plaintiff himself invoked the benefits of the Restitution Law by suing the defendants and obtaining a disposition of the case in the Court of Restitution Appeals, it is most surprising that he overlooks the fact that the basis for that action was Military Government Law No. 59, not the Four Power Occupation Agreement."

During oral argument on plaintiff's remand motion, defendants' counsel stipulated that in the interest of having a prompt disposition of plaintiff's appeal, defendants would not object to this Court's considering Military Government Law No. 59, the allegedly overlooked law. Counsel's stipulation was subsequently confirmed by letter. (App. X).

ARGUMENT

POINT I

THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFF HAS FAILED TO STATE A CLAIM UNDER ANY TREATY OF THE UNITED STATES

The decision of the district court

Judge Brieant, in his memorandum opinion of January 2, 1975 (App. T), dismissed plaintiff's amended complaint for failure to state a claim upon which relief could be granted. The district judge did not, as plaintiff erroneously contends on this appeal, hold that the district court lacked subject matter jurisdiction but, on the contrary, expressly held that it did have subject matter jurisdiction:

> "This District Court has subject matter jurisdiction, because the right of plaintiff to recover under his complaint will be sustained if the treaties of the United States are given one construction, and will be defeated if they are given another." (memorandum opinion of May 20, 1974 [App. L], incorporated by reference in the January 2, 1975 memorandum opinion [App. T]*.

* Defendants do assert on this appeal, as an alternative argument to sustain the dismissal of the complaint, that the district court also lacked subject matter jurisdiction. (See Point IV, infra.)

The treaties relied on by plaintiff

Plaintiff, in his amended complaint (App. R), claimed that he had been injured by actions which defendants allegedly took in violation of the Hague Convention of 1907, 36 Stat. 2277, the Treaty of Versailles, S. Doc. No. 348, 67th Cong., 4th Sess. 3329 (1923), the Kellogg-Briand Pact, 46 Stat. 2343 (1929), and the Four Power Occupation Agreement, 5 U.S.T. 2062 (1945).

As defendants show below, none of these treaties prohibited the German government or any of its citizens from expropriating property situated in German territory irrespective of whether it was owned by Germans or aliens. Furthermore, none of the cited treaties conferred any rights on private individuals.

A. The Hague Convention

The only portions of the Hague Convention on which plaintiff purports to rely are the Preamble and Articles 1, 41 and 46.

The Hague Convention was an attempt to impose restrictions on the ways in which belligerent powers could wage war, and governed such areas as the treatment of prisoners of war and inhabitants of occupied

territory.

The Preamble merely stated that in the absence of provisions covering specific situations, the warring nations should be governed by "the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." (36 Stat. 2280).

The Preamble does, however, clearly define and limit the scope and applicability of the Hague Convention. The Convention's provisions, the Preamble states:

> "...are intended to serve as a general rule of conduct for the belligerents in their mutual relacions and in their relations with the inhabitants*." (36 Stat. 2279).

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* While the reference to "inhabitants" is ambiguous, Judge Brieant concluded, and the context clearly shows, that the inhabitants referred to are the citizens and residents of countries occupied by, or at war with, the belligerent powers. See, e.g., Articles 2, 44 and 45 of the Regulations respecting the laws and customs of war on land:

Article 2

> "The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war." (36 Stat. 2296).

Article 44

> "A belligerent is forbidden to force the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defense." (36 Stat. 2306).

Article 45

> "It is forbidden to compel the inhabitants of occupied territory to swear allegiance to the hostile Power." (36 Stat. 2306).

Article 1 of the Convention, which provides:

> "The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention." (36 Stat. 2290).

clearly pertains solely to nations and their armies, and defendants come within neither category. Moreover, Article 2 specifically provides that the Regulations cited by plaintiff:

> "...do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention." (36 Stat. 2290).

Article 41 of the Regulations provides:

> "A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained." (36 Stat. 2306).

But Article 40, which provides:

> "Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately." (36 Stat. 2305-2306),

clearly shows that the injured "party" referred to in Article 41 is a "state", with the consequence that only nations, and not private individuals, have the right to demand compensation in the event that a private party violates the Convention.

Article 46 is equally inapposite. It provides:

> "Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.
>
> Private property cannot be confiscated." (36 Stat. 2306-2307).

At first glance the reference to confiscation of property might seem in point, but Article 46 is a part of a group of Regulations headed: "Military Authority over the Territory of the Hostile State". Consequently it is clear that Article 46 prohibits confiscation of property of citizens of occupied nations, and has no bearing on defendants' alleged conduct or plaintiff's right to obtain relief under the Hague Convention.

B. The Kellogg-Briand Pact

The Kellogg-Briand Pact, 46 Stat. 2343 (1929), is equally inapplicable. As plaintiff has earlier conceded, it is but "a sweeping declaration renouncing war as an instrument of national policy"*, and there is nothing in the language or history of the Pact that indicates any intent to confer rights or impose duties on individuals or businesses.

C. The Treaty of Versailles

Even assuming that the Treaty of Versailles, S. Doc. No. 348, 67th Cong. 4th Sess. 3329 (1923), is a treaty within the meaning of 28 U.S.C. §1331 or §1350 (a most dubious proposition since it was never ratified by the United States, and since the 1921 Treaty of Berlin, 42 Stat. 1939, on which plaintiff apparently relies, only provided that the

* Quoted from plaintiff's brief in support of his petition for rehearing and reargument, p. 19.

United States would be granted by Germany some of the benefits bestowed by the Versailles Treaty upon its signatories), the Articles cited by plaintiff are patently unrelated to his claims. They merely required Germany to pay reparations for damages suffered by French nationals at the hands of German nationals (Article 124), permitted the Allies, with the cooperation of Germany, to prosecute German citizens for war crimes committed during World War I (Articles 227-230), fixed responsibility for damage done Allied countries and their citizens by Germany and her allies during World War I (Article 231), and provided that Allied nationals injured by acts done in Germany during World War I could file complaints in a newly created arbitration tribunal (Article 300).

D. The Four Power Occupation Agreement*

The Four Power Occupation Agreement (Agreement on Control Machinery in Germany), 5 U.S.T. 2062 (1945), simply provided for the governance of occupied Germany by the United States, England, the Soviet Union and France during the period at the end of World War II in which Germany was "carrying out the basic requirements of unconditional surrender". It contains no provisions that relate in any way to private individuals.

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* This treaty will be discussed in greater detail in relation to Military Government Law No. 59 in Point V, infra.

Plaintiff does not have the right to sue defendants under the Hague Convention, the Kellogg-Briand Pact, the Treaty of Versailles or the Four Power Occupation Agreement

After reviewing the provisions of the treaties relied on by plaintiff, Judge Brieant held that they conferred no express rights on individuals, and declined to imply a private right of action under them:

> "We find no authority, and none is cited to us in which a private cause of action arising out of extraterritorial acts, but justiciable in the federal courts, has been asserted successfully as arising by implication out of any international treaty.
>
> When the international lawyers and diplomats desire to create a private right arising out of a treaty, they know how to do so. The classic example, of course, is the Warsaw Convention, by which private causes of action were created by express language of the Convention itself, against international air carriers for the benefit of passengers and shippers. See Chapter Three thereof, and particularly Article 28(1) which fixes the venue for the private action.
>
> The learning with respect to international compacts differs from the interpretation of legislative intent followed by our courts in implying private rights of action under remedial statutes such as the federal securities laws. An accepted principle of international law seems to be that to create a private right or obligation, the treaty must, as in the case of the Warsaw Convention, express a clear intent so to do." (Memorandum opinion dated May 20, 1974, pages 11-12, App. L)

Defendants submit that Judge Brieant's decision is correct and in accord with a long line of cases (discussed below) in which the courts, in recognition of the limited role the judiciary should play

in the area of foreign affairs, have, for the purpose of determining which claims could properly be adjudicated, distinguished between treaties which, either by their express terms or reasonable implication, confer rights on individuals, and those, like the ones on which plaintiff purports to rely, which are either broad policy pronouncements or pacts regulating the relations of the convenanting nations with one another.

The Supreme Court, in Edye v. Robertson, 112 U.S. 580 (1884) (the Head Money Cases), stated the distinction as follows:

> "A treaty is primarily a compact between independent Nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this, the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the Nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found, in treaties which regulate the mutual rights of citizens and subjects of the contracting Nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same cat gory as other laws of Congress by its declaration that 'This Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land as an Act of Congress is, whenever its

provisions prescribe a rule by which the rights of the private citizens or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it, as it would to a statute." (Id. at 598-599).

And Z&F Assets Realization Corp. v. Hull, 114 F.2d 464 (D.C. Cir. 1940), aff'd, 311 U.S. 470 (1941), applying the test set forth in the Head Money Cases, held that a private party's claim that its rights under the Berlin Treaty of 1921* had been infringed did not state a justiciable controversy:

"The compact [the Treaty of Berlin] is between the two governments; the citizens [plaintiffs] are not parties thereto; and no provision is made or contemplated therein, for submitting any question to the courts." (Id. at 472.) (footnote omitted.)

Similarly, in Pauling v. McElroy, 164 F. Supp. 390 (D.D.C. 1958), aff'd, 278 F.2d 252 (1960), cert. denied, 364 U.S. 835 (1960), the court held that a private citizen cannot enforce treaties that do not purport to grant individuals rights:

"The provisions of the Charter of the United Nations, the Trusteeship Agreement for the Trust Territory of the Pacific Islands, and the international law principle of freedom of the seas relied on by plaintiffs are not self-executing and do not vest any of the plaintiffs with individual legal rights which they may assert in this Court. The claimed violations of such international obligations and principles may be asserted only by diplomatic negotiations between the sovereignties concerned." (Id. at 393.)

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* As previously noted, on page 15, supra, the Treaty of Berlin is alleged by plaintiff as the basis for his assertion that the Treaty of Versailles, which was never signed or ratified by the United States, is nevertheless a "treaty of the United States".

Accord: People of Saipan v. United States Department of Interior, 356 F. Supp. 645 (D. Haw. 1973).

These principles have also been recognized and codified in the Restatement (2nd) of Foreign Relations, which bars actions by aliens against a state absent express authorization, §175, and remits to the state of which the alien is a national the sole right to seek redress of his injuries, §174. See also §1, Comment f.

While plaintiff cites a plethora of cases where courts have held that they have jurisdiction to consider claims allegedly based on treaties, an examination of these cases shows that in every instance in which the courts held that the plaintiff had stated a claim upon which relief could be granted, the plaintiff was either itself a party to the treaty (as in the cases involving Indian tribes) and thus clearly had standing to sue under it, or the treaty relied on expressly conferred rights on private individuals.

The bulk of the cases cited by plaintiff involve the rights of Indians under treaties between the United States and their tribes. These cases include: DeCoteau v. District County Court, 95 S.Ct. 1082 (1975); Antoine v. Washington, 95 S.Ct. 944 (1975); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974); McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973); Skokomish Indian Tribe v. France, 269 F.2d 555 (9th Cir. 1959); Phelps v. Hanson,* 163 F.2d 973

* Plaintiff's reference to Phelps v. Hanson is both puzzling and misleading, since the Ninth Circuit held that the district court lacked subject matter jurisdiction inasmuch as the complaint did not raise any federal question.

(9th Cir. 1947); Leech Lake Band of Chippewa Indians v. Herbst, 334 F. Supp. 1001 (D. Minn. 1971); Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968); and Makah Indian Tribe v. McCauly, 39 F. Supp. 75 (W.D. Wash. 1941).

Oneida Indian National, Skokomish Indian Tribe, Leech Lake Band of Chippewa Indians, and Makah Indian Tribe, supra, all involve suits by Indian tribes to enforce specific rights conferred on them by treaties to which they were parties.

Oneida Indian Nation, supra, is representative of this group of cases and well illustrates the significant differences between the treaties relied on by the Indians and those alleged herein by plaintiff.

The plaintiffs in Oneida Indian Nation were the Oneida Indian Nation of New York State and the Oneida Indian Nation of Wisconsin. The defendants were the Counties of Oneida and Madison in New York State.

Plaintiffs alleged, inter alia, that pursuant to three treaties between the Oneidas and the United States - the Treaty of Fort Stanwix of 1784, 7 Stat. 15, the Treaty of Fort Harman of 1789, 7 Stat. 33, and the Treaty of Canandaigua of 1794, 7 Stat. 44 -- the Indians had the right to occupy certain land which had wrongfully been taken from them.

Since the plaintiffs were themselves parties to the treaties on which they relied, their standing to sue under those treaties could not be doubted. Moreover, the rights the Oneidas sought to enforce were specifically granted by those treaties. The Treaty of Fort Stanwix

stated that:

> "[t]he Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled",

and under the Treaty of Fort Harman, plaintiffs were "again secured and confirmed in the possession of their respective lands". Moreover, Article II of the Treaty of Canandaigua provided:

> "The United States acknowledge the lands reserved to the Oneida, Onandaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same nor disturb them...in the free use and enjoyment thereof..." (The aforequoted passages from the Oneida treaties are set forth in the Supreme Court's opinion at 414 U.S. 664, n.3.)

Dodge v. Nakai, supra, differs from the preceding Indian tribe cases only in that the Indian tribe was a defendant, rather than a plaintiff. The remaining Indian cases, DeCoteau v. District County Court, Antoine v. Washington and McClanahan v. State Tax Commission of Arizona, supra, are also readily distinguishable.

In DeCoteau, Sioux Indians claimed that under a 1867 treaty between their tribe and the United States, 15 Stat. 505, the states in which they resided had no jurisdiction over them. The Supreme Court held that the treaty had been superseded by a subsequent act of Congress. Consequently, the Court did not reach the question of their rights, if any, under that treaty.

In both Antoine and McClanahan, however, the Supreme Court

upheld the right of individual Indians to be free of state regulations. McClanahan involved the right of a state to tax the income earned by an Indian on a reservation. Following a long line of cases, the Supreme Court held that within reservations, Indians had exclusive sovereignty of their affairs. Consequently, the decision did not revolve around the rights of individual Indians under treaties but rather the jurisdiction of states within reservations and the question of whether federal law preempted the field.

Similarly, Antoine held that under an act of Congress which ratified an agreement between plaintiffs' tribe and the United States, the states were not free to interfere with the right of tribe members to hunt and fish. Like McClanahan, the central question was one of whether the federal government had exclusive power to regulate the affairs of the Indians.

The non-Indian cases cited by plaintiff are equally inapposite.

Corbett v. Stergios, 381 U.S. 124 (1965), Kolovrat v. Oregon, 366 U.S. 187 (1961), Hauenstein v. Lynham, 100 U.S. 483 (1880), and Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), all involved the question of the rights of aliens to acquire, inherit, hold or sell land in the United States under treaties which specifically granted them those rights. Since Hauenstein v. Lynham, supra, is representative of these cases, defendants will limit their discussion to Hauenstein to

avoid unnecessary repetition.

Hauenstein held that Swiss citizens had the right, under an 1850 Treaty between the United States and the Swiss Confederation, 11 Stat. 587, to sell property which, under Virginia law, they were not permitted to inherit.

Unlike the Hague Convention, the Kellogg-Briand Pact, the Treaty of Versailles and the Four Power Occupation Agreement, the Swiss-American Treaty specifically and unambiguously conferred rights on the citizens of those two nations. Article 5 of the Treaty states, in pertinent part:

> "...in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the canton in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of the State or canton will permit to sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated." (quoted in Hauenstein v. Lynham, 100 U.S. at 486) (emphasis supplied).

Asakura v. Seattle, 265 U.S. 332 (1924), although it does not involve land, is quite similar to the foregoing group of cases. Plaintiff was a Japanese citizen domiciled in the state of Washington who, because of his nationality, was denied the right, under a Seattle ordinance, to operate a pawnshop in that city. The Supreme Court held the ordinance

invalid on the ground that it conflicted with a 1911 treaty between Japan and the United States, 37 Stat. 1504.

Unlike the Hague Convention, the Kellogg-Briand Pact, the Treaty of Versailles and the Four Power Occupation Agreement, the Japanese-American Treaty was clearly intended to confer specific rights on the citizens of Japan and the United States:

> "The citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.... The citizens or subjects of each...shall receive, in the territories of the other, the most constant protection and security for their persons and property..." (Asakura v. Seattle, 265 U.S. at 340).

Maximov v. United States, 373 U.S. 49 (1963), merely held that a domestic trust was a separate taxable entity, apart from its beneficiaries, and thus did not qualify for the benefits which the 1945 Income Tax Convention between the United States and the United Kingdom, 60 Stat. 1377, bestowed on residents of Great Britain.

Hidalgo County Water Control and Improvement District v. Hedrick, 226 F.2d 1 (5th Cir. 1955), the final case cited by plaintiff to bolster his contention that the district court improperly dismissed his claim under the Hague Convention, the Kellogg-Briand Pact, the Treaty of Versailles and the Four Power Occupation Agreement, held that the plaintiffs therein, two individuals and two political subdivisions

of the State of Texas, failed to state a claim for relief under the Mexican-American Treaty of 1945, 59 Stat. 1219 (1945).

Plaintiff has thus failed to cite a single case in which a court has held that a private individual has standing to sue under a United States treaty that does not expressly confer specific rights on the claimant.

Consequently, it is respectfully submitted that this Court should affirm the district court's holding that plaintiff has failed to state a claim under a treaty of the United States because:

(1) defendants' alleged conduct did not violate any of the provisions of the cited treaties;

(2) none of the treaties on which plaintiff relies confers specific rights on private individuals; and

(3) this Court should not imply private rights of action under such treaties.

POINT II

THE DISTRICT COURT CORRECTLY HELD THAT PLAINTIFF HAS FAILED TO STATE A CLAIM UNDER THE LAW OF NATIONS

The court below also held that plaintiff failed to state a claim under the law of nations clause of 28 U.S.C. §1350, which provides, in pertinent part:

> "The district court shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations..."

Plaintiff, an alien suing two other aliens over an allegedly tortious act occurring outside the United States, evidently claims that any tort committed anywhere in the world by anyone (whether a United States citizen or not) against anyone (other than a United States citizen), which violates the law of nations, is cognizable by a United States district court under §1350 even if the tort has no connection of any kind with the United States.

Moreover, plaintiff apparently claims that the law of nations protects the rights of individuals as well as nations.

As defendants show below, neither the history of §1350 nor the decisions construing it support such a broad, untrammelled reading of the statute. Indeed, such a construction of §1350 would convert the United States courts into the policemen of the world.

Significantly, plaintiff has not cited, and defendants have not found, a single case in which a federal court accepted jurisdiction

under §1350 of an action that did not involve some nexus with the United States, such as a United States defendant or a tort committed in the United States.

Nor has plaintiff cited, or defendants found, a single case in which the courts held that an individual, as well as a nation, had rights protected by the law of nations. In the one case where a court upheld a claim under the law of nations clause of §1350, the Court made it clear that while the individual alien had standing to sue under §1350, his claim had to show that he was injured by a violation of his nation's rights.*

The law of nations

Although it has been the law since 1789 that an alien can sue in the federal courts if he has been tortiously injured in violation of the law of nations**, defendants have found only one case in which jurisdiction was successfully asserted under the law of nations.* Consequently, such judicial construction as there is of the "law of nations" is mainly dicta.

Scholarly commentary is not much more extensive, and centers primarily on the applicability of the law to nations, rather than to individuals. This is not surprising, however, since historically it was

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* Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961), discussed infra, at page 29.

** §9 of the Judiciary Act of 1789, 1 Stat. 73, 77 provided that the district courts shall have cognizance of:

"...all causes where an alien sues for a tort only in violation of the law of nations..."

This provision is now contained in 28 U.S.C. §1350.

the state, and not its citizens, that asserted rights under the law of nations.*

What little discussion there is of why the newly formed United States was interested in protecting aliens' rights under the law of nations suggests two principal reasons: first, a desire to expand the trade of the United States both by encouraging foreigners to invest in this country and by insuring reciprocal treatment of Americans abroad; and second, a fear that absent federal control of the treatment of aliens, one of the states might take action that could thrust the United States into war.

The first of these concerns was expressed by James Madison during the debates on the ratification of the Constitution, when he noted that the inability of foreign merchants to obtain the protection of the state courts had inhibited "many wealthy gentlemen from trading or residing with us". 3 Elliott's Debates 583 (1888). This concern is further evidenced by the fact that most of this nation's early treaties explicitly provided for the right of citizens of the signatories to do

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* Plaintiff, at page 19 of his appeal brief, quotes the following passage from Brierly, The Law of Nations (6th ed. 1963), but omits the underlined portion which supports defendants' contention that historically an individual could not sue under the law of nations:

> "No state is legally bound to admit aliens into its territory, but if it does so it must observe a certain standard of decent treatment towards them, and their own state may demand reparation for an injury caused to them by a failure to observe this standard." (Id. at 276)(emphasis supplied).

business in one another's territory*.

The latter point was stressed by Alexander Hamilton, who observed:

> "The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts...is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned." (The Federalist, No. 80)

Neither of these two concerns, however, would suggest any desire by the founding fathers to protect nonresident aliens from the acts of foreign governments taken outside the territory of the United States.

Nor do the few recent decisions involving the law of nations afford plaintiff any basis for bringing an action under §1350.

In Khedivial Line, S.A.E. v. Seafarers' International Union, 278 F.2d 49 (2nd Cir. 1960), an action by an Egyptian ship owner to enjoin a U.S. labor union from picketing its ships, this Court held that the plaintiff did not state a claim for relief under the law of nations.

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* See, e.g., Treaty of Amity and Commerce between France and the United States, 8 Stat. 12 (1778); Treaty of Amity and Commerce between Prussia and the United States, 8 Stat. 84 (1785); Treaty of Peace and Friendship between Morocco and the United States, 8 Stat. 100 (1787); Treaty of Peace and Amity between Algiers and the United States, 8 Stat. 133 (1795); and Treaty of Friendship between Spain and the United States, 8 Stat. 138 (1795).

After noting that despite the age of §1350 and its predecessors, it had rarely been applied, and that the Court had found no case which squarely based jurisdiction on a claim under the law of nations, the Court observed that the plaintiff had failed to show that the law of nations bestows rights on individuals, and not solely on nations.

Adra v. Clift, 195 F. Supp. 857 (D. Md. 1961), the one case upholding jurisdiction under §1350's law of nations clause, also revolved around the question of whether a nation's rights had been violated.

Plaintiff, a Lebanese national, alleged that his former wife, who had remarried and who lived in the United States, had used a false passport to get the child into the United States.

The court, in finding a violation of the law of nations, stressed that misuse of a passport injures both the country that issued it and the country that admits an alien in reliance on it:

> "...despite the fact that the child Najwa was a Lebanese national, not entitled to be admitted to the United States under an Iraqi passport, defendant concealed Najwa's name and nationality, caused her to be included in defendant's Iraqi passport, and succeeded in having her admitted to the United States thereby. These were wrongful acts not only against the United States, 8 U.S.C.A. §1182, 18 U.S.C.A. §1546, but against the Lebanese Republic, which is entitled to control the issuance of passports to its nationals." (195 F. Supp. at 864-865) (emphasis supplied).

Lopes v. Reederei Richard Schroder, 225 F. Supp. 292 (E.D. Pa. 1963), and Valanga v. Metropolitan Life Ins. Co., 259 F. Supp. 324 (E.D.

Pa. 1966), both held that the federal courts lacked subject matter jurisdiction under §1350 over the claims of the defendants therein, in the former case because the torts alleged - unseaworthiness and negligence - did not constitute violations of the law of nations, and in the latter case because a suit for the recovery of insurance proceeds was not a true tort action.

However, the courts did discuss the law of nations in some depth and their review of its history supports defendants' contention that it is primarily concerned with: (a) the relations of nations with one another; and (b) offenses that disrupt or undermine the sovereignty or economic base of nations.

Lopes quoted extensively from Kent's Commentaries, which defined the "Law of Nations" as:

> "that code of public instruction which defines the rights and prescribes the duties of nations in their intercourse with each other..." (quoted at 225 F. Supp. 297),

and listed four offenses as coming within the scope of that law: violation of passports, violation of ambassadors, piracy and the slave trade.

Valanga concluded that:

> "A violation of the law of nations means a violation of those standards by which nations regulate their dealings with one another inter se." (259 F. Supp. at 328.)

Consequently, since defendants' alleged conduct caused no injury to any nation, defendants have not violated the law of nations.

POINT III

PLAINTIFF'S CLAIMS ARE BARRED
BY THE ACT OF STATE DOCTRINE

In addition to finding that plaintiff failed to state a claim either under a United States treaty or under the law of nations, Judge Brieant also suggested in his January 2, 1975 opinion that plaintiff's claims would in any event be barred by the Act of State doctrine.

After analyzing this doctrine and its exceptions, Judge Brieant concluded:

> "We need not, however, rest our decision on this ground, since for the reasons stated above, the complaint fails to state a claim cognizable in this court." (App. T, p. 22)

Defendants submit that Judge Brieant was correct in his determination that it is not even necessary to reach the Act of State doctrine in this case. However, since plaintiff has argued the doctrine on this appeal, defendants further submit that if this Court should find it necessary to consider the issue, it should find that plaintiff's claims are indeed barred by the Act of State doctrine.

The meaning of the Act of State doctrine

The Act of State doctrine is perhaps best set forth in Underhill v. Hernandez, 168 U.S. 250 (1897), where Chief Justice Fuller said for a

unanimous Supreme Court:

> "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." (Id. at 252.)

A. The Bernstein cases

The Act of State doctrine was applied by this Court in Bernstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246 (2nd Cir. 1947), cert. denied, 332 U.S. 771 (1947), when it declined to take jurisdiction over a claim that the defendant had wrongfully obtained plaintiff's property at an unfair price as a result of duress applied by the Nazi government of Germany, a claim substantially similar to that alleged by plaintiff in the instant litigation.

Although there have been two major developments in the Act of State doctrine since Van Heyghen, defendants contend that Van Heyghen is still the controlling precedent in this Circuit and requires the dismissal of plaintiff's action.

The first of these developments was the decision of this Court in Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij, 210 F.2d 375 (2nd Cir. 1954), an action which, like Van Heyghen and the instant case, involved an alleged improper acquisition of property as a result of the actions of German officials prior to the commencement of World War II.

The crucial distinction between Van Heyghen and Nederlandsche-Amerikaansche is that after this Court ordered the plaintiff in Nederlandsche-Amerikaansche "to refrain from alleging matters which would cause the court to pass on the validity of acts of officials of the German government", (210 F.2d at 375), the United States State Department issued a press release and sent this Court a letter stating that:

> "The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials." (quoted by the Court at 210 F.2d 376.)

In reliance on the State Department's pronouncement, this Court reversed its initial decision and held that the Act of State doctrine was not applicable in cases involving Nazi actions.*

B. First National City Bank v. Banco Nacional de Cuba

The second major development was the rejection of the Bernstein exception by six Justices of the Supreme Court in First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972),** thus, in

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* The view that the Act of State doctrine need not be applied when the Executive explicitly authorizes the courts to determine the controversy on the merits has come to be known, and will be referred to hereafter, as the "Bernstein exception".

** Plaintiff concedes that the Bernstein exception was rejected by six justices in Banco Nacional. Brief on appeal of plaintiff, pp. 38-39.

effect, reinstating the policy, followed by this Court in Van Heyghen, that courts should not review the validity of acts of other nations taken within their own territory.

Plaintiff, however, seeks to avoid the implications of the elimination of the Bernstein exception by contending that Banco Nacional holds only that the courts are now free to decide for themselves when to apply the Act of State doctrine, and that under the standards announced in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), this Court should consider plaintiff's allegations on the merits.

A close reading of Sabbatino, however, shows that the case supports defendant's contention that the Act of State doctrine bars plaintiff's claims.

C. The Sabbatino decision

In Sabbatino, the Supreme Court held that under the Act of State doctrine it was improper for the federal courts to consider the validity of Cuba's expropriation of a Cuban corporation which was a wholly-owned subsidiary of an American corporation.

Plaintiff points to a portion of the Supreme Court's opinion in which Justice Harlan said that the need to apply the Act of State doctrine was less where: (a) there was general agreement as to the applicable law, (b) the act was taken by a government no longer in existence, and (c) the issue in dispute was of minor importance, and

contends that the instant litigation presents just such a situation.

Plaintiff, however, has wholly ignored Justice Harlan's discussion of the widely divergent views which different nations have of acts such as those from which defendants allegedly benefited.

In the first place, plaintiff overlooks Justice Harlan's statement that:

> "There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a State's power to expropriate the property of aliens." (376 U.S. at 428) (footnote omitted).

Plaintiff himself contends that he was an alien in Germany both because he had dual Swiss and German citizenship (amended complaint, ¶2, App. R), and because Jews were regarded by the Germans as aliens (plaintiff's brief on appeal, p. 11).

The heart of plaintiff's allegations is that the German government "...adopted the policy of making it impossible for Jews to own economic assets including banking firms in Germany" (amended complaint, ¶8, App. R), a decision quite similar to Cuba's determination that its sugar crop should not be controlled by foreigners. Consequently, plaintiff can hardly claim that defendants' alleged conduct is a clear violation of the law of nations.

Moreover, the right of a nation to expropriate the property of an alien is a highly sensitive and important issue that the courts would do well to avoid:

> "It is difficult to imagine the courts of this country embarking on adjudication in an area which touches more sensitively the practical and ideological goals of the various members of the community of nations." (376 U.S. at 430.) (footnote omitted.)

Therefore, a decision that this Court is free to determine the propriety of the former German policy on Jewish control of banks will inevitably require this Court to take a position on the right of a foreign government to expropriate the property of aliens who own industries that are regarded as crucial to its economy, a decision the Supreme Court in Sabbatino was not prepared to make, and a decision which may have adverse effects on the State Department's negotiations on behalf of American companies whose property has been expropriated by countries throughout the Middle East and Latin America.

Similarly, if plaintiff is regarded as a German national rather than as an alien, adjudication of his claims will require the federal courts to take a position on the difficult and sensitive question of the right of a foreign government, within its own borders, to act in a discriminatory or even oppressive fashion towards classes of its citizens, a question which, defendants submit, should not be reached in a case having no legal nexus with the United States.

Conclusion

Consequently, this Court should decline to take jurisdiction of plaintiff's claims under the law of nations on the ground that the Act of State doctrine bars this Court from considering the validity of the alleged expropriation of plaintiff's property.

POINT IV

THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIM

The district court's decision

Defendants asserted both in their motion to dismiss plaintiff's original complaint (App. H) and in their motion to dismiss plaintiff's amended complaint (App. S) that the district court lacked subject matter jurisdiction over plaintiff's claims. The district judge, however, in reliance on Bell v. Hood, 327 U.S. 678 (1946), held that it had such jurisdiction:

> "...because the right of plaintiff to recover under his complaint will be sustained if the treaties of the United States are given one construction, and will be defeated if they are given another." (memorandum opinion of Judge Brieant, dated May 20, 1974, App. L, page 5, incorporated by reference in memorandum opinion of Judge Brieant, dated January 2, 1975, App. T.)*

For the reasons hereinafter set forth, defendants respectfully

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* During the hearing on defendants' motion to dismiss plaintiff's original complaint, plaintiff conceded that there was no diversity jurisdiction under §1332 since all parties were aliens. (App. L, p. 3). Nevertheless, the amended complaint alleges jurisdiction under §1332 on the ground that defendants' bank accounts were attached in New York. (App. R, ¶6)

Plaintiff misconstrues §1332. The cases are clear that it does not apply to controversies between aliens. Karakatsanis v. Conquistador Cia. Nav. S.A., 297 F. Supp. 723 (S.D.N.Y. 1965), Dassignienis v. Cosinos Carriers & Trading Corp., 321 F. Supp. 1253 (S.D.N.Y. 1970). The citizenship of the banks which held defendants' funds is wholly irrelevant. In the first place, they are not parties. Secondly, the citizenship of garnishees does not affect or create diversity of citizenship jurisdiction. Bacon v. Rives, 106 U.S. 99 (1882).

contend that the district judge's determination was erroneous and that the dismissal of the amended complaint should also be sustained for lack of subject matter jurisdiction.*

Bell v. Hood

In Bell v. Hood, supra, the Supreme Court held that if a plaintiff asserted a claim under the Constitution or the laws of the United States, there was federal question jurisdiction under 28 U.S.C. §1331 unless the alleged claim was "immaterial and made solely for the purpose of obtaining jurisdiction" or was "wholly insubstantial and frivolous".** (327 U.S. at 682-683.)

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* The cases are clear that an appellee is free to raise on appeal:

> "...any matter in the record in support of the district court's order, including arguments previously rejected by the district court..." United Optical Workers Union v. Sterling Optical Co., Inc., 500 F.2d 220, 224 (2nd Cir. 1974),

even though the appellee did not cross-appeal. Dandridge v. Williams, 397 U.S. 471, 475, n.6 (1970); United Optical Workers Union v. Sterling Optical Co., Inc., supra; and Blanton v. State University of New York, 489 F.2d 377, 382, n.7 (2nd Cir. 1973).

Moreover, lack of subject matter jurisdiction may be raised at any time, even on appeal and even on the court's own initiative. Louisville & Nashville Railroad Co. v. Mottley, 211 U.S. 149 (1908).

** There appears to be no reason why the test of subject-matter jurisdiction should vary when the claim is based on a treaty, rather than on the Constitution or laws of the United States. Cf. Hidalgo County Water Control v. Hedrick, 226 F.2d 1 (5th Cir. 1955).

Defendants do not deny that plaintiff's original and amended complaint both seek recovery under treaties of the United States. They do, however, contend that jurisdiction is wanting since the Hague Convention, the Kellogg-Briand Pact, the Treaty of Versailles and the Four Power Occupation Agreement clearly afford no basis for plaintiff's claims. This is not, as Judge Brieant suggested, a case where plaintiff's right to recover turns upon the manner in which a treaty is construed. Rather, it is a case where no reasonable interpretation of the treaties in question sustains plaintiff's action.

The treaties on which plaintiff relies

Defendants have discussed the Hague Convention of 1907, 36 Stat. 2277, the Treaty of Versailles, S. Doc. No. 348, 67th Cong., 4th Sess. 3329 (1923), the Kellogg-Briand Pact, 46 Stat. 2343 (1929), and the Four Power Occupation Agreement, 5 U.S.T. 2062 (1945), in some detail in Point I, supra, and will not repeat that discussion herein. Defendants' position, however, is that there is no reasonable basis for contending that plaintiff has a bona fide claim against defendants under those treaties.

The Hague Convention restricts the manner in which nations can conduct war. It does not impose any duties or restrictions on individuals such as defendants. The Kellogg-Briand Pact is but "a sweeping declaration of national policy".* The Treaty of Versailles is not even a treaty of

* Quoted from plaintiff's brief in support of his petition for rehearing and reargument, p. 19.

the United States (see Point I, pp. 13-14, supra), and in any event was concerned only with reparations and prosecution for acts committed by Germany and the Axis powers during World War I. And the Four Power Occupation Agreement merely provided for the governance of occupied Germany at the close of World War II.

Plaintiff's claim

The amended complaint alleges that Germany undertook a war against "the civilized world" in violation of the Hague Convention, the Kellogg-Briand Pact, and the Treaty of Versailles, and to that end, adopted a set of laws that had the effect first of denying plaintiff the right to carry on his banking business in Germany, and second of forcing plaintiff to sell his bank to defendants at an unfair price. Plaintiff further alleges that Germany's aggressive war and racial laws were adopted and carried out by the German government and its "political and business leaders", but carefully stops short of alleging that defendants were among those leaders or played any role in determining Germany's policies.

At no point, therefore, does plaintiff connect defendants with the purported violation of any treaties, other than by suggesting that defendants were the indirect beneficiaries of acts taken by others.

Moreover, the failure to allege a violation of any treaties by defendants (rather than others) cannot be ascribed to oversight; Judge

Brieant specifically conditioned plaintiff's right to file an amended complaint on plaintiff's alleging "...with particularity the specific provisions of such treaty or treaties relied upon." (endorsement order granting reargument, App. Q).

Consequently, plaintiff's assertion that his claims arise under treaties of the United States is obviously insubstantial and frivolous and his action should be dismissed for want of subject matter jurisdiction.

POINT V

MILITARY GOVERNMENT LAW NO. 59 IS NOT A "LAW OF THE UNITED STATES", AND NO FEDERAL QUESTION ARISES UNDER IT. MOREOVER, PLAINTIFF HAS NOT STATED ANY CLAIM FOR RELIEF BASED ON THAT MILITARY LAW.

Plaintiff claimed that the district court overlooked the applicability of Military Government Law No. 59 ("MGL 59"), which had not been cited in the original or amended complaints, and asked this Court to remand the case to Judge Brieant with directions to consider MGL 59.

Defendants contended that MGL 59 had clearly been called to the attention of the district court (see page 8 of this brief) and therefore consented, in the interest of economy, to have this Court consider whether the amended complaint states a claim under MGL 59. (App. X).

The history of MGL 59*

Near the end of World War II, and in anticipation of Germany's surrender, the United States, Great Britain and the Soviet Union entered into an "Agreement on Control Machinery in Germany" (subsequently, after

* The description of military government in occupied Germany hereinafter set forth is taken primarily from Flick v. Johnson, 174 F.2d 983 (D.C. Cir. 1949).

State law to them, Erie R. Co. v. Thompkins,

France joined in the Agreement, known as the Four Power Occupation Agreement), 5 U.S.T. 2062 (1945), whereby they agreed that collectively they would govern Germany until a legitimate German government could be formed, and administrative power and responsibility transferred to it. They further agreed that for administrative convenience, Germany would be divided into several sectors, the boundaries of which would be coterminous with the areas occupied by their respective armies.

Pursuant to the Four Power Occupation Agreement, a "Control Council", composed of the Commanders in Chief of each of the four Allies, was formed and acted as the supreme governing body of Germany. Thereafter, matters affecting Germany as a whole were determined by the Control Council; local matters were dealt with by the separate commanders, each exercising administrative responsibility in the sector controlled by his nation's troops. Where possible, the four nations were to endeavor to adopt similar regulations so the rules would be as uniform as possible throughout Germany.

In accordance with the Four Power Occupation Agreement, the President of the United States directed General Eisenhower, who was both the Commander in Chief of the American Forces in Germany and the Military Governor of the American Zone, to carry out and support the policies adopted by the Control Council.

Pursuant to the authority vested by the President, the Four Power Occupation Agreement and the Control Council, the American Military

Government, on November 10, 1947, promulgated MGL 59, 12 Fed. Reg. 7983 (1947), which was designed:

> "...to effect to the largest extent possible the speedy restitution of identifiable property...to persons who were wrongfully deprived of such property...for reasons of race, religion, nationality, ideology or political opposition to National Socialism." (Article 1(1)).

The procedure MGL 59 established was as follows:

The claimant would initially file his petition with a Central Filing Agency which would then forward it to the appropriate Restitution Agency (Article 55). The Restitution Agency would then notify the holder of the claimed property that a petition had been filed and the holder would be given an opportunity to answer the petition (Article 61). If an objection were filed to the petition, the Restitution Agency would attempt to effect an amicable settlement (Article 62). If this proved impossible, the Restitution Agency would refer the case to the Restitution Chamber, a German court granted jurisdiction over restitution claims (Article 63).

The Restitution Chamber would hold public hearings and render written opinions (Article 68). An appeal from its decisions originally ran to the Board of Review, an American court situated in Germany (Article 69), all of whose members were United States citizens. (Regulation 4 under MGL 59, 13 Fed. Reg. 4901 [1948].) Subsequently, the Board was replaced by the United States Courts of the Allied High Commission for Germany ("Court of Restitution Appeals" or "CORA"). (MGL 59, Amendment

3, 15 Fed. Reg. 1547 [1950].)

Pursuant to Regulation 7 under MGL 59:

"Decisions of the Court of Restitution Appeals shall be final and not subject to further review." (15 Fed. Reg. 1548 [1950].)

Except as otherwise specifically provided by MGL 59, any claim within its compass had to be prosecuted pursuant to its provisions (Article 57). Tort claims not based on wrongful taking of property were, however, permitted to be prosecuted in the ordinary German civil courts (Article 57).

Article 56 of MGL 59 specifically barred any claim not filed on or before December 31, 1948.

MGL 59 is not a law of the United States

While defendants contend, for the reasons stated below, that plaintiff no longer has a claim under MGL 59 on any conceivable theory, defendants shall first address themselves to the jurisdictional question (raised during the argument on plaintiff's motion to remand) whether MGL 59 is even a "law of the United States" under 28 U.S.C. §1331.

Federal question jurisdiction, pursuant to 28 U.S.C. §1331, is restricted to controversies arising under "the Constitution, laws or treaties of the United States". It is defendants' contention that MGL 59 is not a law within the meaning of that provision.

A. The legislative history of §1331

The Supreme Court, in Romero v. International Terminal Operating Co., 358 U.S. 354 (1959), concluded that the slight differences in wording between 28 U.S.C. §1331 and its predecessor, §1 of the Judiciary Act of 1875, 18 Stat. 470, "were not intended to change in any way the meaning or content of the Act of 1875". (Id. at 359 n.5.) Moreover,

the Court noted, the language of the Judiciary Act of 1875 "was taken straight from Art. 3, §2, cl. 1" of the Constitution. (Id. at 363.) Consequently, in order to interpret the meaning of the word "laws" in §1331, it is necessary to turn first to the Constitution, which provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising, under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority..." (U.S. Const., art. I, §2.)

The history of Article 3, Section 2 is sketchy. An examination of the debates on the Federal Constitution reveals that on July 18, 1787, James Madison proposed that the jurisdiction of the federal courts:

> "...shall extend to cases under laws passed by the General Legislature..." (Warren, The Making of the Constitution 331 [1929].)

This association of laws with the enactments of the legislature is also indicated by the August 6, 1787 draft of the Committee of Detail, which provided:

> "The jurisdiction of the supreme court shall extend to all cases arising under laws passed by the legislature of the United States..." (1 Elliott, Journal of the Federal Convention, at 380.)

Three weeks later, however, without any discussion, the words "passed by the legislature" were deleted. 1 Elliott, Journal of the Federal Convention, 483.

While it is hazardous in the absence of adequate information

to speculate as to the reasons for this change, it seems probable that it was more a question of phraseology than content.

Since the Constitution carefully withheld from the President the power to make laws, the only potential source of "law", other than the legislature, was the courts. And while the common law was of course quite familiar to the framers of the Constitution, the generally accepted jurisprudence in the 18th century was that courts "find", not "make" law. Consequently, it is likely that the phrase "passed by the legislature" was regarded as surplusage and stricken accordingly.

B. Judicial construction of "laws of the United States"

Although the courts have gradually expanded upon the apparent original meaning of the phrase, they have stayed close to the concept that a "law" is an enactment of the legislature.

While under certain circumstances, for example, courts will treat Executive Orders and administrative regulations as laws, in each instance where they have done so they have stressed that the order or regulation was issued pursuant to a specific Congressional authorization. See, e.g., Murphy v. Colonial Federal Savings and Loan Ass'n., 388 F.2d 609 (2nd Cir. 1967) (the Home Owners' Loan Act of 1933 specifically authorized the Federal Home Loan Bank Board to prescribe the regulation in question); Farmer v. Philadelphia Electric Company, 329 F.2d 3 (3rd Cir. 1964) (the Executive Order and regulation of the General Services

Administration were both authorized by the Federal Property and Administrative Services Act of 1949 and the Defense Production Act of 1949); Patton v. Administration of Civil Aeronautics, 217 F.2d 395 (9th Cir. 1954) (the regulation of the Administrator was issued pursuant to the Alaska Airports Act) and Braden v. University of Pittsburgh, 343 F. Supp. 836 (W.D. Pa. 1972), vacated on other grounds, 477 F.2d 1 (3rd Cir. 1973) (the Executive Order was issued pursuant to the Federal Property and Administrative Services Act of 1949).

Stevens v. Carey, 483 F.2d 188 (7th Cir. 1973), in marked contrast, involved an Executive Order which, while duly issued, was not specifically authorized by statute. While holding that it lacked subject matter jurisdiction, the court stated:

> "The plaintiff contends that all Executive Orders confer jurisdiction under 28 U.S.C. §1331 and that her action therefore should not have been dismissed on the jurisdictional ground. She cites several cases which purportedly state that controversies involving Executive Orders arise "under the laws of the United States," see, e.g., Farkas v. Texas Instrument, Inc., 375 F.2d 629 (5th Cir. 1967), cert. denied, 389 U.S. 977, 88 S.Ct. 480, 19 L.Ed.2d 471, and Braden v. University of Pittsburgh, 343 F. Supp. 836 (W.D. Pa. 1972). However, an analysis of the cases cited reflects the rationale that the Executive Orders involved were issued pursuant to statutory authority providing for presidential implementation and thereby have the force and effect of law. See also Farmer v. Philadelphia Electric Co., 329 F.2d 3, 4-8 (3rd Cir. 1964). As we will note hereinafter, that rationale is not applicable in the case of the Executive Order here involved, even though the Order was not beyond the presidential power." (Id. at 190.) (emphasis in original.)

See also, McDaniel v. Brown & Root, 172 F.2d 466 (10th Cir. 1949), and

Crabb v. Wedden Bros., 164 F.2d 797 (8th Cir. 1947), both holding that jurisdiction cannot be founded on Executive Orders.

The major expansion of the meaning of "laws" has been the recognition of the significant role courts play in filling the gaps between federal statutes in areas of federal concern. Thus the Supreme Court in Illinois v. City of Milwaukee, 406 U.S. 91 (1972), relying heavily on this Court's opinion in Ivy Broadcasting Co. v. American Tel. & Tel. Co., 391 F.2d 486 (2nd Cir. 1968), held that judicially created federal common law was also "law of the United States" for jurisdictional purposes.

The courts' treatment of territorial "laws" has also shown great sensitivity to the underlying thrust of Article 3 - to insure that issues of nation-wide concern will be determined by the federal, and not the state, courts.

Where the United States has exercised full sovereignty over newly acquired territory, the laws of that territory, enacted before the annexation, have been regarded as laws of the United States, unless Congress provides otherwise. See, e.g., Stokes v. Adair, 265 F.2d 662 (4th Cir. 1959), and Mater v. Holley, 200 F.2d 123 (5th Cir. 1952). This, of course, is quite logical, since the alternative would be to require Congress to enact piecemeal an entire system of laws for such territories.

Where, however, the territories, although under the ultimate

control of the United States, are granted some autonomy, the laws which Congress does enact with respect to them are generally not regarded as "laws of the United States". See, e.g., People of Puerto Rico v. Hermanos, 309 U.S. 543 (1940); People of Puerto Rico v. Shell Co., 302 U.S. 253 (1937); and Harris v. Boreham, 233 F.2d 110 (3rd Cir. 1956). The reasoning of these cases is that federal laws must be of general applicability. Where a "law" is concerned with local policy it is not really a law of the United States. See also, American Society and Trust Co. v. Commissioners of the District of Columbia, 224 U.S. 491 (1912), and 28 U.S.C. §1363, which provide that for jurisdictional purposes, laws applicable exclusively to the District of Columbia are not laws of the United States.

C. Military occupation cases

The few cases which defendants have found involving the legal status of the relationship between the United States and territory occupied by it as a conqueror have uniformly taken the position that the United States did not acquire sovereignty over the captured territory but served only as a caretaker government until such time as a legitimate government could be formed. See, e.g., Cobb v. United States, 191 F.2d 604 (9th Cir. 1951), which dealt with American occupancy of Okinawa following World War II, and Acheson v. Wohlmuth, 196 F.2d 866 (D.C. Cir. 1952), Flick v. Johnson, 174 F.2d 983 (D.C. Cir. 1949), and Eisner v. United States, 117 F. Supp. 197 (Ct. Cl. 1954), all dealing with occupation

of post-World War II Germany.

Acheson v. Wohlmuth, supra, states the American policy most fully:

> "Occupation by our troops does not make conquered territory a part of the United States or mean that such territory 'ceased to be a foreign country...'
>
> - - - - -
>
> [O]ccupied territory is to be administered for the protection of the inhabitants and the occupying force; occupation should not be used as a device for transferring sovereignty.
>
> - - - - -
>
> Germany at all times remained a political entity - an entity to which men and women could give formal allegiance and in which they could hold citizenship. This situation was quite consonant with Allied policy. Although the destruction of the 'Nazi State' was one of our war aims, and the attempted eradication of Nazi influences was one of the first measures to be taken by our occupying forces, government units staffed by Germans and responsible for many aspects of domestic government remained in existence, or were revived, with the consent and support of the American Military Government. From the start of the occupation, it was the policy of our Government to reconstitute German administrative machinery and to initiate German selfgovernment, all looking toward the emergence of a new Germany." (196 F.2d at 868-869.) (footnotes and citations omitted.)

Flick v. Johnson, supra, also merits extensive consideration, for it held that the authority of the American military governor to issue "laws" in the American zone stemmed directly from an international body, and that consequently a court established by the American military

governor was an international tribunal, rather than a "court of the United States":

> "Upon the surrender of Germany, the Four victorious Powers, the United States, Great Britain, France and Russia, completed military control of the conquered land. Agreeably to plan, the armies of each occupied a separate zone. It was agreed that supreme authority over Germany would be exercised, on instructions from their Governments, by the Commanders in Chief, 'each in his own zone of occupation, and also jointly, in matters affecting Germany as a whole.' At the same time a 'Control Council' was constituted, composed of the four Commanders in Chief, as the supreme governing body of Germany. This plan of operation was expressly limited to the period of occupation 'while Germany is carrying out the basic requirements of unconditional surrender.' (That period has continued since, and still prevails.) Arrangements for the subsequent period were to be 'the subject of a separate agreement.' (Declaration of Berlin, June 5, 1945, 12 U.S. Dept. of State Bull. 1054.)
>
> In support of the foregoing arrangement for the temporary government of Germany, the President of the United States, acting through his Joint Chiefs of Staff, directed the Commander in Chief of the American Forces in Germany, in his capacity as Military Governor of the American Zone of Occupation, to carry out and support, in that Zone, the policies agreed upon in the Control Council, whose authority 'to formulate policy and procedures and administrative relationships with respect to matters affecting Germany as a whole will be paramount throughout Germany.' This document confirms and reinforces the supreme authority with which the American Military Governor, in his capacity as Zone Commander, was clothed by the Council." (13 U.S. Dept. of State Bull. 596, October 17, 1945.) (emphasis supplied) (Flick v. Johnson, 174 F.2d at 984.)
>
> "Thus the power and jurisdiction of that Tribunal stemmed directly from the Central Council, the supreme governing body of Germany, exercising its authority in behalf of the Four Allied Powers.

- - - - -

"Accordingly, we are led to the final conclusion that the tribunal which tried and sentenced Flick was not a tribunal of the United States." (Ib. at 986.)

Consequently, it would appear that MGL 59 is not a "law of the United States". It was not enacted by Congress or by express authorization of Congress, but rather by authorization of an international body. It was local in its orientation, applying solely to Germany, a country over which the United States claimed no sovereignty. It was, in effect, a German law, promulgated by the acting government of Germany, and was administered and enforced, in large measure, by German courts and German officials.

Therefore, absent pendent jurisdiction (discussed below), the federal courts have no jurisdiction to consider plaintiff's claim under MGL 59.

Plaintiff's claim does not arise under a law of the United States

Even assuming, arguendo, that MGL 59 is a law of the United States, the courts still have no jurisdiction under §1331 because plaintiff's claim does not "arise" under MGL 59.

In the first place, MGL 59 established a self-contained set of restitution rules. It stated that its procedures were exclusive (Article 57) and that the decisions of the courts it created to hear restitution cases were final and non-reviewable (Article 59). It further provided that no restitution claims could be brought under it after December 31,

1948 (Article 56). Since plaintiff's complaint herein is not brought in a prescribed court, and was not commenced within the allowable time, it cannot be said to be brought under MGL 59.*

Secondly, plaintiff's claim for restitution has already been adjudicated by the courts designated by MGL 59 in the case of Association J. Dreyfus & Co. v. Merck, Finck & Co., Case No. 49, Court of Restitution Appeals, March 7, 1951 (attached as an exhibit to the reply affidavit of William Schurtman in support of defendant's motion to dismiss plaintiff's complaint, App. K). See page 5 of this brief and pages 32 and 33 of plaintiff's brief on appeal.

Plaintiff's only remaining claim is that defendants wrongfully obtained the settlement incorporated in that CORA decision. Such a claim is based on the ordinary common law tort of fraud, and does not require a construction of MGL 59 for its determination.

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." (Schulthis v. McDougal, 225 U.S. 561, 569 (1912), quoted with approval by Gully v. First Nat. Bank, 299 U.S. 109, 114 (1936).)

Here the "validity, construction or effect" of MGL 59 is not

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* When a federal statute which creates a right or confers jurisdiction on the federal courts provides that a party suing under it must do an act as a prerequisite to commencing an action, and a time period is prescribed for that act, the requirement is jurisdictional. See, e.g., Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972), which held that the failure of a claimant under the Civil Rights Act of 1964 to file an administrative notice within the period provided by the statute deprived the court of jurisdiction to consider his claim.

in dispute. The only issue raised by plaintiff is whether in 1951 defendants wrongfully procured a settlement of a restitution action commenced in Germany under MGL 59. Consequently, plaintiff's claim does not meet the test set forth in Gully and Schulthis, supra, and the federal courts lack jurisdiction under §1331 to consider it.

Corp., 397 U.S. 150 (1970), the Court explained that the test

POINT VI

THE FEDERAL COURTS LACK PENDENT JURISDICTION TO CONSIDER PLAINTIFF'S COMMON LAW CLAIMS

If this Court agrees with the district court that plaintiff failed to state a claim under the law of nations or any treaty of the United States, or if it should hold that the federal courts lack subject matter jurisdiction over plaintiff's claims under the law of nations and various treaties of the United States, then, in accordance with the policy expressed by the Supreme Court in United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966), any remaining common law claims should also be dismissed.

After first noting that the federal courts have the power to hear state causes of action when the state and federal claims are derived from "a common nucleus of operative fact" and the federal claim has "sufficient substance" to confer subject matter jurisdiction on the court, Justice Brennan, speaking for a unanimous court in Gibbs (the Chief Justice not participating), detailed the circumstances under which that power should be exercised:

> "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's rights. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction

of hostilities, but the seizure of property in preparation

> over state claims, even though bound to apply state law to them, Erie R. Co. v. Thompkins, 304 U.S. 64....Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. Certainty, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." (383 U.S. at 726.) (footnotes omitted.) (emphasis supplied.)

The instant case, of course, comes directly within the class of cases which the Supreme Court in Gibbs emphatically held should be dismissed for want of jurisdiction. Not only have plaintiff's federal claims been dismissed before trial, they have been dismissed at the very earliest stage at which dismissal is possible, before defendant has filed an answer. No conceivable benefit of judicial economy, convenience or fairness to litigants can possibly exist in these circumstances.

Dismissal of plaintiff's pendent common law claims, if any, is also consistent with the controlling decisions of this Court. In the recent case of City of New York v. Richardson, 473 F.2d 923 (2nd Cir. 1973), this Court held that the district judge properly dismissed a state cause of action for lack of jurisdiction where the plaintiff's federal claims were dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure. See also Klein v. Shields & Co., 470 F.2d 1344 (2nd Cir. 1972).

In his arguments below, plaintiff sought to rely on Ryan v. J. Walter Thompson Co., 453 F.2d 444 (2nd Cir. 1971), cert. denied, 406 U.S. 907 (1972), Gem Corrugated Box Corp v. National Kraft Container Corp., 427 F.2d 499 (2nd Cir. 1970), and Hagans v. Lavine, 415 U.S. 528 (1974), to support his claim of pendent jurisdiction.

Ryan v. J.Walter Thompson Co. and Gem Corrugated Box Corp. v.

National Kraft Container Corp., supra, in no way require this Court to retain plaintiff's common law claims. In Ryan, this Court approved the action of the district court in dismissing plaintiff's state cause of action at the same time as it dismissed his federal claims. In Gem, this court merely held that the district court had not acted improperly in retaining pendent jurisdiction over state law actions where the federal question causes of action were dismissed pursuant to stipulation of the parties prior to trial.

Hagans v. Lavine, supra, also does not compel a different result. Hagans involved a claim by certain welfare recipients that a welfare regulation which permitted a state to recoup prior emergency rent payments from subsequent welfare grants violated the U.S. Constitution, a federal statute and federal and state welfare regulations. The constitutional argument was asserted pursuant to 28 U.S.C. §§1983 and 1343 which permit suits in the federal courts to redress deprivation of Constitutional rights. The other claims invoked the Court's "pendent", rather than "federal question" jurisdiction, since less than $10,000 was at issue.

The Supreme Court held that the pendent claims should have been adjudicated. United Mine Workers of America v. Gibbs, supra, was distinguished on three grounds: (1) economy and convenience would result from disposing of the pendent claims; (2) disposition of the case on the

statutory claim would enable the Court to avoid ruling on the constitutional claim; and (3) Gibbs' rationale centered upon "considerations of comity and the desirability of having a reliable and final determination of the state claim by state courts", a consideration wholly irrelevant in Hagans since all claims were based on federal law.

Hagans in no way requires this court to retain jurisdiction of plaintiff's non-federal claims. No advantage of economy or convenience would result to the courts or the parties as a result. Moreover, like Gibbs, and unlike Hagans, the pendent claims in this case are non-federal.

Consequently, there is no reason for this Court to refrain from dismissing plaintiff's pendent claim concurrently with his federal claims.

CONCLUSION

The decision of the district court to dismiss plaintiff's amended complaint should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 75-7135

WILLY DREYFUS,

Plaintiff-Appellant,

v.

AUGUST von FINCK and MERCK, FINCK & CO.,

Defendants-Appellees.

AFFIDAVIT OF SERVICE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Juan Delgado, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 596 Riverside Drive, New York, N.Y.
That on August 18, 1975, he served 2 copies of Brief

on John Horan, Esq.
Fox, Glynn & Melamed
Attorney for Plaintiff-Appellant
299 Park Avenue
New York, N.Y.

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Juan Delgado

Sworn to before me this
18th day of August, 1975.

John V. D'Esposito

JOHN V. D'ESPOSITO
Notary Public, State of New York
No. 30-0932950
Qualified in Nassau County
Commission Expires March 30, 1977